Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	WT Docket No. 94-147
	)	
Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area	)	
	)	
MARC SOBEL	)	WT Docket No. 97-56
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences	)	
	)	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	)	
	)	
Licensee of Certain Part 90 Stations in the Los Angeles Area	)	

SECOND MEMORANDUM OPINION AND ORDER

Adopted: June 1, 2010 **Released: June 2, 2010**

By the Commission:

I. INTRODUCTION

1. On April 12, 2010, the Commission released a Memorandum Opinion and Order denying the request by James A. Kay and Marc D. Sobel to reconsider the Commission's decision to revoke specified 800 MHz radio licenses as a sanction for unlawful conduct.[1] The April 12 Order specified that Kay and Sobel were authorized to continue operation of their stations only "until 12:01 A.M. on the 11th day after release of this memorandum opinion and order." *Id*. at ¶9. On April 21, 2010, the day before the termination of their authorizations, Kay and Sobel filed a "Petition for Reconsideration" of the April 12 Order, a "Motion for Stay" of that order pending a decision on the reconsideration petition, and a "Motion for Continuation of Operating Authority." By this order, we hereby dismiss the repetitious petition for reconsideration. We also explain that if the petition were not procedurally defective, we would deny it on the merits. In light of that disposition, we dismiss as moot the motion for stay and the motion for continuation of operating authority.

[1] James A. Kay, Jr., *Memorandum Opinion and Order*, FCC No. 10-55 (April 12, 2010) ("April 12 Order").

II. BACKGROUND

2. In 1994 and 1997 we designated for revocation hearings certain licenses held by Kay and Sobel, and in 2002 we ordered that the licenses be revoked on findings that the licensees had transferred control of their licenses without authority to do so and had lacked candor toward the Commission.[2] In 2005, the Court of Appeals affirmed the revocation orders,[3] and the Supreme Court denied review that year.[4]

3. Despite having lost their challenge to the orders directing revocation of their licenses, Kay and Sobel filed shortly thereafter a "Motion to Modify Sanctions" asking that we reconsider the decision to order revocation and proposing as an alternative penalty the surrender of other licenses in the UHF band and the payment of a fine. The April 12 Order denied that motion and directed Kay and Sobel to cease operations on their frequencies. Accordingly, consistent with the April 12 Order, the Wireless Telecommunications Bureau updated our Uniform Licensing System on April 23, 2010, to reflect the cancellation of the licenses at issue.

III. DISCUSSION

4. Kay and Sobel seek reconsideration of the April 12 Order, but their request is repetitious because it simply asks again for relief already denied them on reconsideration.[5] Although Kay and Sobel insist that the self-styled "Motion to Modify Sanctions" was not a petition for reconsideration,[6] the decision to revoke the licenses was an integral part of the underlying proceeding. A request that the Commission re-open the matter and re-visit the carefully considered sanction determination is a petition for reconsideration no matter what its caption.[7] The rule against repetitious petitions for reconsideration is designed precisely to deter disappointed parties from asking for the same relief again and again in the hope that they will

[2] *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002); *Marc Sobel*, 17 FCC Rcd 1872 (2002), *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004).

[3] *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

[4] *Kay v. FCC*, 126 S.Ct. 176 (2005).

[5] *See* 47 C.F.R. § 1.106(k)(3) ("A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed … as repetitious.").

[6] *See*, *e.g.*, Petition for Reconsideration at 5.

[7] *See Minnesota PCS Limited Partnership*, 17 FCC Rcd 126, 127 ¶4 (CWD 2002) ("The Commission … is not bound by the title that a filing party gives a pleading."). Indeed, the "Motion for Modification of Sanctions" was itself subject to dismissal on timeliness grounds. Rule 1.106(f) establishes a 30-day deadline for petitions for reconsideration, but the motion was filed approximately 3½ years after the close of administrative proceedings. Kay and Sobel frankly acknowledge their lateness. Petition for Reconsideration at 5 ("[t]he Licensees recognize that the time for challenging the Commission's 2002 decisions has long passed").

eventually get a different answer. We therefore dismiss the pending petition for reconsideration as repetitious.[8]

5. We would deny the petition for reconsideration even if we were not dismissing it. The gist of the petition for reconsideration is that the April 12 Order failed to consider Kay and Sobel's arguments on their merits. That claim is plainly incorrect. The April 12 Order determined that considerations of administrative and judicial finality outweighed any of the asserted benefits that may have resulted from Kay and Sobel's proposed alternative to the revocation of their licenses. Specifically, we held that Kay and Sobel had "fail[ed] to demonstrate factors sufficiently extraordinary to upset the principles of … finality," because they had not shown – or even attempted to show – that revoking their licenses would "constitute an injustice."[9] We also rejected Kay and Sobel's claims that rescinding the revocation order would result in net benefits to the public, finding instead that such an action would not "yield such extraordinary public interest benefits as to justify upsetting considerations of administrative finality."[10] Kay and Sobel thus are wrong that the April 12 Order addressed only whether to seek recall of the Court of Appeals' mandate. Although that issue played a role in our decision, it was but one of several factors we balanced in reaching our decision to deny relief.[11] Kay and Sobel's real complaint is that we struck a balance of considerations different from the one they asked for.

6. Nor were Kay and Sobel entitled to any greater explanation than we provided in the April 12 Order. This proceeding was terminated at the administrative level in 2002 and at the judicial level in 2005. When the Supreme Court denied certiorari of the Court of Appeals' decision affirming the revocation orders (Kay and Sobel never challenged the penalty, only the evidence supporting the Commission's factual findings), the matter became final and no longer subject to review. Otherwise, parties could indefinitely prolong proceedings, even after judicial review, by filing – as Kay and Sobel have done here – repetitive petitions, however captioned, for further review.[12]

7. That said, we will provide a brief discussion of the policy interests at stake here. We disagree with Kay and Sobel's contention that rescinding the revocation order and imposing an alternative punishment would serve the public interest. We find that the public interest balance does not tip in their favor. Although some public safety users in the Los Angeles area might benefit from additional UHF spectrum made available by Kay and Sobel's proposal, the

[8] We take this action ourselves rather than delegating the matter to the Staff in order to achieve absolute finality in this matter.

[9] April 12 Order at ¶6.

[10] *Ibid*.

[11] We note that, despite Kay and Sobel's insistence that the mandate is little more than a meaningless piece of paper, after the Court of Appeals' *James A. Kay, Jr.* decision, Kay and Sobel filed no fewer than three motions asking the Court to stay the mandate.

[12] *Cf. I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (it is "the most plebeian statutory construction to find implicit in the 60-day limit upon judicial review a prohibition against the agency's permitting, or a litigant's achieving, perpetual availability of review by the mere device of filing a suggestion that the agency has made a mistake and should consider the matter again.").

Commission's Public Safety and Homeland Security Bureau recently issued an order which dramatically increased amount of available public safety UHF spectrum in the Los Angeles area.[13] In light of this action, Kay and Sobel's proposal would provide only marginal benefit. On the other hand, restoring the Kay and Sobel licenses would further complicate reconfiguration of the 800 MHz band in southern California, which is already complex due to the proximity of the Mexican border and the concomitant restrictions on spectrum usage in the area.[14] Moreover, restoration of Kay and Sobel's licenses would diminish the amount of available 800 MHz spectrum in the border region, thus leaving public safety users with access to fewer useable channels.

8. We must also weigh the scant public interest "benefits" against our interest in the integrity of our enforcement process and the finality of our judgments. Kay and Sobel were found to have violated the rule that prevents the unauthorized transfer of control of spectrum and to have lied about it to the Commission. Those are serious infractions that disqualified Kay and Sobel from holding the licenses at issue.[15] We do not revoke licenses lightly, and while we might consider revisiting a final, judicially affirmed judgment in extraordinary circumstances, Kay and Sobel have come nowhere near justifying the reversal of a considered decision rendered eight years ago. To grant relief here would invite every licensee subject to a severe sanction to engage in prolonged dickering over the penalty.

9. Because we are dismissing the petition for reconsideration, both the motion for stay and the motion for continuation of operating authority are moot and we dismiss them.

10. It is our understanding that in the five years since we ordered that their licenses be revoked, Kay and Sobel have continued to earn substantial license-related fees. That is enough of a windfall; this matter must now come to an end. Kay and Sobel forfeited their opportunity to hold the licenses at issue when they violated our rules, and it is high time that they face the consequences of their actions. We direct the Enforcement Bureau to ensure that Kay and Sobel in fact have desisted from using their formerly licensed frequencies, and if the Bureau determines otherwise, to take immediate action, including forfeiture proceedings and/or proceedings to revoke any other licenses held by Kay or Sobel.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration filed April 21, 2010, IS DISMISSED as repetitious.

12. IT IS FURTHER ORDERED, that the Motion for Stay filed April 21, 2010, IS DISMISSED as moot.

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[13] *County of Los Angeles, Calif.*, 23 FCC Rcd 18389 (PSHSB 2008).

[14] *See* 47 C.F.R. § 90.619 (Operations within the U.S./Mexico and U.S./Canada border areas).

[15] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1210-11 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).

13. IT IS FURTHER ORDERED, that the Motion for Continuation of Operating Authority filed April 21, 2010, IS DISMISSED as moot.

14. IT IS FURTHER ORDERED, that copies of this order SHALL BE SERVED on James A. Kay, Jr., Marc D. Sobel, and the Enforcement Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary